No.

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF NORTH CAROLINA,

PETITIONER,

v.

NORFOLK JUNIOR BEST,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

APPENDIX TO PETITION FOR WRIT OF CERTIORARI [CAPITAL CASE]

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Supreme Court of North Carolina

September 1, 2020, Heard in the Supreme Court; December 18, 2020, Filed

No. 300A93-3

Reporter
376 N.C. 340 *; 852 S.E.2d 191 **; 2020 N.C. LEXIS 1138 ***; 2020 WL 7416360

STATE OF NORTH CAROLINA v. NORFOLK JUNIOR BEST

Prior History: State v. Best, 342 N.C. 502, 467 S.E.2d 45, 1996 N.C. LEXIS 7 (Feb. 9, 1996)

Disposition: REVERSED AND REMANDED.

Counsel: **[***1]** Joshua H. Stein, Attorney General, by Jonathan P. Babb, Special Deputy Attorney General, for the State-appellee.

Thomas, Ferguson & Mullins, LLP, by Jay H. Ferguson, and Center for Death Penalty Litigation, by Ivy A. Johnson, for defendant-appellant.

Judges: EARLS, Justice. Justice ERVIN did not participate in the consideration or decision of this case. Justice NEWBY dissenting.

Opinion by: EARLS

Opinion

[*340] **[**193]** On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order entered on 23 January 2018 by Judge Douglas B. Sasser, Sr. in Superior Court, Bladen County denying defendant's motion for appropriate relief. Heard in the Supreme Court on 1 September 2020.

EARLS, Justice.

In December 1991, the bodies of an elderly couple, Gertrude and Leslie Baldwin, were found in their home in Whiteville, North Carolina. The couple had been beaten, stabbed, and apparently robbed. Norfolk Junior Best, the defendant in this case, was indicted for first-degree burglary, first-degree rape, robbery with a dangerous weapon, and two **[*341]** counts of first-degree murder. Following a jury trial, he was convicted of all counts and sentenced to death. His conviction was affirmed on direct appeal by this Court. State v. Best, 342 N.C. 502, 467 S.E.2d 45 (1996).

In postconviction proceedings, it became clear that **[***2]** the State failed to produce certain pieces of evidence to Mr. Best prior to the 1993 trial. Instead, the evidence was, in part, voluntarily provided to Mr. Best's postconviction counsel in 2011. Later that year, postconviction counsel located additional evidence in the attic of Whiteville City Hall. After the additional evidence was produced and uncovered, Mr. Best filed a motion for appropriate relief arguing, *inter alia*, that the State's failure to disclose exculpatory evidence was a violation of his right to due process pursuant to the United States Supreme Court's decision in Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). The trial court denied the motion, concluding that Mr. Best had not shown prejudice.

Mr. Best claims, and the State denies, that the undisclosed evidence was material to his guilt such that he was prejudiced by the State's failure to produce it. Mr. Best argues, and the State denies, that had the evidence been disclosed, there is a reasonable probability that the outcome of his trial would have been different. We conclude that the undisclosed evidence was material. It was reasonably probable that, had it been disclosed to **[**194]** Mr. Best prior to trial, the

outcome would have been different. Therefore, we reverse **[***3]** the trial court's denial of Mr. Best's motion for appropriate relief, remanding with instructions to grant the motion and order a new trial.

Background[1]

Prior to trial, Mr. Best had requested discovery from the State several times regarding the case against him. On 20 December 1991, Mr. Best filed a motion for discovery requesting, *inter alia*, the following:

> 6. To permit the defendant to inspect and copy or photograph books, papers, documents, photographs, motion picture, mechanical or electronic recordings, tangible objects, or copies or portions thereof which are within the possession, custody, or control of the State and which are **[*342]** material to the preparation of this defendant's defense, which the State intends to use as evidence at defendant's trial or which were obtained from or belong to the defendant (*G.S., 15A-903(d)*;
>
> 7. To provide a copy or permit the defendant or his attorney to inspect and copy or photograph results or reports of physical or mental examinations or of tests, measurements or experiments made in connection with this case, or copies thereof, within the possession, custody, or control of the State, the existence of which is known or by the exercise of due diligence may become known **[***4]** to the prosecutor (*G.S. 15A-903(e)*;
>
> 8. The District Attorney is also given notice that these requests are continuing, and the State is under a duty to disclose any of the requested material promptly to the defendant or his attorney if discovered or the State decides to use it at the captioned defendant's trial (*G.S. 15A-907*);

On 12 March 1992, Mr. Best filed a motion (dated 7 January 1992) seeking to inspect, examine, and test physical evidence in the State's control. On the same date, remarking that the 20 December 1991 request had gone unanswered, Mr. Best filed a motion to compel the State to produce discovery. The motion to compel specifically requested test results, exculpatory information, and potentially favorable evidence. After being told that the District Attorney had an "open file policy," defense counsel attempted on 19 March and 20 March 1992 to review Mr. Best's file at the District Attorney's office, but in both instances was told that the file was unavailable. On 2 April 1992, the District Attorney provided defense counsel with discovery, and continued to produce materials until shortly before trial.

Although the file stamps are unclear, it appears that Mr. Best filed two more discovery requests **[***5]** on 24 June and 16 September 1992. In the first, Mr. Best requested DNA test results from samples referenced in a report that had been produced to him. In the second, he requested information relevant to the reliability of the DNA testing expected to be offered as evidence during trial.

In the preliminary statement that appears before our decision on Mr. Best's direct appeal, the evidence presented at trial was described as follows:

> The defendant was tried on two charges of first-degree murder and one charge each of first-degree burglary, robbery with a dangerous weapon, and first-degree rape. **[*343]** The State's evidence showed that Leslie Baldwin and his wife, Gertrude Baldwin, were eighty-two and seventy-nine years of age, respectively. They were killed in their home during the night of 30 November [1991]. Earlier that day, the defendant had done yard work for them.
>
> Mr. Baldwin died as a result of the cutting of his carotid artery, and Mrs. Baldwin died of blunt-force trauma to the head. Money was missing from Mr. Baldwin's wallet and from Mrs. Baldwin's purse. The **[**195]** defendant's DNA matched one of the semen samples taken from Mrs. Baldwin, and his fingerprint matched one on a paring knife found **[***6]** beside Mr. Baldwin's body. The defendant bought between $700 and $1,000 worth of crack cocaine within two days after the killings.

Best, 342 N.C. at 508-09, 467 S.E.2d at 49-50.

The Baldwins were discovered dead in their home on Tuesday, 3 December 1991. At trial, the State

[1] The State does not dispute that the evidence identified by Mr. Best was not disclosed prior to trial, arguing instead that Mr. Best has not shown that there is a reasonable probability that the undisclosed evidence affected the outcome of Mr. Best's trial. We note this only to emphasize our sensitivity to the principle that "[f]act finding is not a function of our appellate courts." *Godfrey v. Zoning Bd. of Adjustment, 317 N.C. 51, 63, 344 S.E.2d 272, 279 (1986)*. If there was a factual dispute to be resolved in this case, the appropriate remedy would likely be to remand to the trial court for an evidentiary hearing.

presented evidence that the Baldwins were robbed of several hundred dollars, killed in their home, and that Mrs. Baldwin had been raped. The couple's daughter testified that Mrs. Baldwin, who took various medications, filled her pillbox regularly each Thursday. The medicine in the pillbox was arranged by time of day, as well as day of the week. Based on the slots that were filled with medicine in the pillbox, the couple's daughter testified that Mrs. Baldwin had last taken her medication at 11:00 p.m. on Saturday, 30 November 1991. The couple's daughter also testified that Mr. Baldwin habitually turned on a light in the kitchen before retiring to bed. The light was discovered to be on in the kitchen. Similarly, she testified that Mr. Baldwin, by routine, retrieved and read the newspaper every morning, and that it was the first thing he did after rising, getting dressed, and taking his medicine. When the Baldwins' bodies were discovered, the papers for Sunday, **[***7]** 1 December; Monday, 2 December; and Tuesday, 3 December 1991 were all laying on the front porch. The State points to this evidence as support for the conclusion that the deaths occurred in the late evening of Saturday, 30 November 1991. A witness for the State testified that she was with Mr. Best at a night club beginning at 12:30 a.m. or 1:00 a.m. on 1 December 1991.

At trial, the State also tendered evidence that Mr. Best was the perpetrator. The trial evidence identified by the State consists of (1) a latent bloody fingerprint, matched to Mr. Best, found on the blade of a paring knife which was lying near Mr. Baldwin's body; (2) the results of a DNA test showing that sperm found in Mrs. Baldwin's vagina was a partial **[*344]** match to Mr. Best, and that the probability of another unrelated person matching the tested profile was "approximately 1 in 459 for the North Carolina white population, 1 in 18 for the North Carolina black population,[2] and 1 in 484 for the North Carolina Lumbee population;" and (3) testimony from Tammy Rose Smith that Mr. Best spent one or two hundred dollars on cocaine in the early morning hours of 1 December 1991, and from Carolyn Troy that Mr. Best spent several hundred **[***8]** dollars on cocaine during the evening of 2 December 1991.

At the trial's conclusion, Mr. Best was convicted and sentenced to death. After we affirmed the conviction, Mr. Best sought postconviction relief. He filed a motion for appropriate relief in August 1997, which the trial court denied in April 1998. We denied certiorari review. *State v. Best, 349 N.C. 365, 525 S.E.2d 179 (1998)*.

[2] Mr. Best is African-American.

In March and August of 2011, the State voluntarily produced parts of its file to Mr. Best's new postconviction counsel. After defense counsel filed a motion seeking complete discovery pursuant to *N.C.G.S. § 15A-1415(f)*, defense counsel discovered additional evidence "in a storage room in the attic of the Whiteville City Hall." The following evidence arose in postconviction discovery:

Undisclosed Forensic Evidence

At trial, a witness for the State testified that hairs were collected from the crime scene. Further, testimony established that, in addition to Mr. Best, head and pubic hair samples were collected from two other suspects, Eddie Best and Daniel Blanks, and from Mr. and Mrs. Baldwin. The hair was analyzed. At trial, Mr. Best's counsel attempted to elicit that none of the hairs had been identified as coming from a Black person but was unable to cross-examine the witness **[***9]** on the findings of a non-testifying expert. However, the State never disclosed that more than 70 hairs collected from the crime scene, found on Mrs. Baldwin's arm, in her pubic hair combings, and beneath Mr. Baldwin's fingernails, were identified as Caucasian **[**196]** and were not a match to anyone who was tested.

At trial, a witness for the State testified that tapings from the crime scene were taken and tested for trace hair and fiber evidence. The State did not disclose, however, that a fiber comparison analysis was conducted between (1) a number of items, including various items of clothing and shoes, from Mr. Best's home and person; and (2) various items from the crime scene, including bedding, tapings, clothing, fingernail scrapings, a place mat, and carpeting. The results of the undisclosed **[*345]** comparison were that no association was found between Mr. Best's effects and the items from the crime scene.

As discussed previously, Mr. Best's fingerprint was located on a paring knife that was lying next to Mr. Baldwin's body at the crime scene. Lab notes which had not been disclosed prior to trial contained the following statement pertaining to the possible fingerprint: "The ridge detail on item **[***10]** #4 was examined & determined to be of no value @ this time however; major case inked impressions will be needed in order to effect any kind of conclusive comparison."

At trial, witnesses for the State testified that blood remnants were found as a result of luminol testing "on the carpet in Gertrude Baldwin's bedroom and in the

hallway" near where Mr. Baldwin was found. Another witness testified that she tested a pair of Mr. Best's shoes and determined that they did not have blood on them. Undisclosed lab notes indicated that the luminol tests had revealed shoe tracks of blood residue, about which the witness did not testify and of which defense counsel was not aware.

Undisclosed Witness Interviews

As discussed previously, Carolyn Troy testified at trial that Mr. Best spent hundreds of dollars during the evening of 2 December 1991, near the time that the State believes the Baldwins were robbed and murdered. However, the State did not disclose Ms. Troy's initial witness interview, during which Ms. Troy stated that she was with Mr. Best at the time, but that he only had $30 to $40 on him.

Other Evidence

The evidence at trial also indicated that the assailant broke a pane of glass to enter **[***11]** the home. A lab report discussing the analysis of the glass indicated that clothing and two pairs of shoes from Mr. Best did not have any glass that matched the glass collected from the crime scene—although one of the pairs of shoes showed glass particles which did not match the glass from the crime scene. The record includes an affidavit from Mr. Best's trial counsel indicating that the report was included in postconviction discovery, and had not been previously disclosed to trial counsel.

The State also did not disclose that three one-hundred-dollar bills were found in a money holder in Mrs. Baldwin's purse.

Undisclosed Alternate Suspects

Finally, the State failed to disclose evidence regarding two alternate suspects: Ricky Winford and Destene Harris.

[*346] *Ricky Winford*

The State's 2011 disclosures contained a number of documents relating to Ricky Winford, an alternate suspect in the crime. Interview notes suggest that a woman called police on the evening of 4 December 1991 to report that, on the morning of 3 December 1991, someone named "Rick" was driving around the Baldwins' neighborhood without lights. The driver drove up and down the street three or four times until someone exited the **[***12]** car and walked away. The car drove off and returned about forty-five minutes later, at which time a friend of the woman's asked the driver what he was doing. The driver stated that he was looking for a friend. This occurred before the Baldwins' bodies were discovered. Police ran the license plate and connected the vehicle to someone named Gary Clayton Derrick, who apparently knew Mr. Winford. Mr. Derrick reported that Mr. Winford had stolen his car and taken off, and later reported speaking with a third person, Janet. The notes indicate that Mr. Winford told Janet "that he had killed some people in Whiteville." In a record of a phone interview, Mr. Derrick reported that Winford had previously bragged about killing people, had **[**197]** previously committed burglaries, and had once pulled a knife on Derrick.

Destene Harris

The State's 2011 disclosures also included a number of documents pertaining to Destene Harris. According to a 5 December 1991 report from Alice Cooke, Mr. Harris threatened to kill some "old farts" that lived hear him. He apparently also often carried a knife. Ms. Cooke also reported that, on 2 December 1991 (a Monday), she had heard Mr. Harris state that he had killed two "old **[***13]** farts" over the weekend. Mr. Harris was incarcerated in Alamance County from 29 November until 3 December 1991.

Mr. Best filed the instant motion, his second motion for appropriate relief, on 16 January 2014. He argued (1) that the State withheld exculpatory evidence in violation of his constitutional rights established in *Brady* and its progeny; (2) that the State misled the jury as to the victims' time of death, or, in the alternative, that his trial counsel was ineffective for failing to refute the State's theory on time of death; and (3) that the State misled the jury as to the reliability of the DNA evidence it presented against him, or, in the alternative, that his trial counsel was ineffective for failing to refute the DNA evidence. Because we determine that Mr. Best's *Brady* claim is meritorious, we need not address the remaining claims.

As to Mr. Best's claim that he is entitled to a new trial due to the State's failure to disclose favorable evidence, the superior court made the following conclusions of law:

[*347] 7. In his MAR2 Claim I, Best claims that he is entitled to a new trial because the state wrongfully concealed exculpatory evidence regarding (a) two alternate suspects[,] (b) **[***14]** exculpatory forensic testing results[,] and (c) key evidence undermining its theory of motive and identity.

8. Best has failed to show the existence of the asserted ground for relief. *N.C. Gen[.] Stat. § 15A-1420(c)(6)*; *Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)*; *State v. Strickland, 346 N.C. 443, 488 S.E.2d 194 (1997)*.

9. In the present case there was overwhelming evidence at trial against defendant and none of the alleged Brady material would have amounted to a reasonable probability of a different result. Therefore, defendant's Brady claim must fail. *Strickland at 457, 488 S.E.2d at 202*.

10. In post-conviction, the overwhelming evidence presented at trial was not refuted or weakened. Instead the post-conviction DNA removed any doubt, reasonable or unreasonable, of defendant's guilt. Both experts testified in post-conviction that the sperm fraction, not the skin fraction, taken from the rape/murder victim was an exact match for defendant's DNA profile. (See 11 April 2016 Post-conviction hearing transcript pp. 56 [testimony of Maher Noureddine] and 68 [testimony of Mark Boodee].)

11. Given the evidence showing defendant's guilt presented at trial, none of the complained of evidence in Claim I, if turned over could have amounted to a reasonable probability of a different result. Additionally, the post-conviction DNA testing results **[***15]** further illustrate the lack of any possible prejudice.

12. As this Court can determine from the motion and any supporting or opposing information presented that this claim is without merit, an evidentiary hearing is not necessary to decide the issues raised in this claim. *N.C. Gen. Stat. § 15A-1420(c)(1)* and *State v. McHone, 348 N.C. 254, 257, 499 S.E.2d 761, 762-63 (1998)*, cert. denied, *528 U.S. 1095, 120 S. Ct. 835, 145 L. Ed. 2d 702 (2000)*.

Mr. Best petitioned for a writ of certiorari to this Court, which we allowed.

[*348] Standard of Review

The trial court denied Mr. Best's motion for appropriate relief without an evidentiary hearing, deciding that it could "determine from the motion and any supporting or opposing information presented that this claim is without merit." *See* *N.C.G.S. § 15A-1420(c)(1)* (2019) (permitting a trial court to forgo an evidentiary hearing on a motion for appropriate relief if "the court determines that the motion is without merit"). Because the trial court did not make findings of fact, instead concluding that Mr. Best was not entitled to relief as a matter of law, our **[**198]** review of the trial court's decision is de novo. *State v. Biber, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011)* ("Conclusions of law are reviewed de novo and are subject to full review.").

Analysis

The State violates the *federal constitution's Due Process Clause* "if it withholds evidence that is favorable to the defense and *material* to the defendant's guilt or punishment." *Turner v. United States, 137 S. Ct. 1885, 1888, 198 L. Ed. 2d 443 (2017)* **[***16]** (quoting *Smith v. Cain, 565 U.S. 73, 75, 132 S. Ct. 627, 630, 181 L. Ed. 2d 571 (2012)*). However, not every failure to disclose violates the Constitution. Instead, "prejudicial error must be determined by examining the materiality of the evidence." *State v. Tirado, 358 N.C. 551, 589, 599 S.E.2d 515, 540 (2004)* (quoting *State v. Howard, 334 N.C. 602, 605, 433 S.E.2d 742, 744 (1993)*). To establish prejudice on such a claim, often referred to as a *Brady* claim,[3] a defendant must show that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* (quoting *United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383, 87 L. Ed. 2d 481 (1985)*).

A reasonable probability is one "sufficient to undermine confidence in the outcome" of the proceeding. *State v. Byers, 375 N.C. 386, 400, 847 S.E.2d 735, 741 (2020)* (quoting *State v. Allen, 360 N.C. 297, 316, 626 S.E.2d*

[3] *See* *Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 2d 215 (1963)* ("We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

271, 286 (2006)). The defendant's burden to show a reasonable probability is less than that for showing a preponderance. Smith, 565 U.S. at 75, 132 S. Ct. at 630 ("A reasonable probability does not mean that the defendant would more likely than not have received a different verdict with the evidence, only that the likelihood of a different result is great enough to undermine confidence in the outcome of the trial." (cleaned up)); *accord* Kyles v. Whitley, 514 U.S. 419, 434, 115 S. Ct. 1555, 1565-66, 131 L. Ed. 2d 490 **[*349]** (1995). However, a reasonable probability is more than a mere possibility. Strickler v. Greene, 527 U.S. 263, 291, 119 S. Ct. 1936, 1953, 144 L. Ed. 2d 286 (1999). A defendant's burden, then, on a *Brady* claim, is more than showing that withheld evidence might have affected the verdict, but less than showing that withheld evidence more likely than not affected the verdict. When we consider whether there was a reasonable probability that the undisclosed evidence would have altered the jury's verdict, we consider "the context of the entire record." United States v. Agurs, 427 U.S. 97, 112, 96 S. Ct. 2392, 2402, 49 L. Ed. 2d 342 (1976).

While we review the entire record, we need not consider every piece of undisclosed material evidence identified by the defendant. Where any portion of the evidence "alone suffice[s] to undermine confidence in [the defendant's] **[***17]** conviction, we have no need to consider his arguments that the other undisclosed evidence also requires reversal under *Brady*." Smith, 565 U.S. at 76, 132 S. Ct. at 631. As a result, any piece of undisclosed evidence, if sufficiently material to undermine confidence in the outcome of the trial, is sufficient to satisfy the defendant's burden on a *Brady* claim.

The question that we must answer when deciding such a claim is not whether the defendant is guilty or innocent, but whether he received a fair trial in accordance with the requirements of due process. *See* Brady, 373 U.S. at 87, 83 S. Ct. at 1196-97 (holding that nondisclosure of favorable evidence to the defense violates due process). As a result, we cannot, and do not here, consider new evidence produced after conviction which may tend to support or negate either guilt or innocence.[4] After a thorough **[**199]** review of the record, and consideration of the arguments of the parties, we are convinced that Mr. Best has met his burden.

[*350] According to the State, the principal evidence presented at trial which proved Mr. Best's guilt consisted of: (1) Best's fingerprint on a paring knife; (2) the partial DNA match between Mr. Best and the semen found in Mrs. Baldwin's vagina; and (3) testimonial **[***18]** evidence that the Baldwins had been robbed, and that Mr. Best was spending large amounts of money on drugs around the time of the murders. This evidence was strong enough at trial for the jury to have convicted Mr. Best. However, upon consideration of the undisclosed evidence, the case is far less compelling.

Regarding the assertion that Mr. Best was spending large sums of money around the time of the murders, the State relied upon the testimony of both Carolyn Troy and Tammy Rose Smith. The State's undisclosed witness interview of Carolyn Troy, in which she stated that Mr. Best had only thirty or forty dollars on him on the night of 2 December 1991, would have permitted Mr. Best to impeach Ms. Troy's testimony. In addition to directly contradicting what Ms. Troy testified to at trial, the fact that Ms. Troy's story had changed over time, if admitted to at trial, could have been used by Mr. Best to impeach her credibility. We have previously stated that "exculpatory evidence is evidence that is either material to the guilt of the defendant or relevant to the punishment to be imposed, . . . including impeachment evidence." State v. Lewis, 365 N.C. 488, 501, 724 S.E.2d 492, 501 (2012) (cleaned up). Ms. Troy was the principal witness testifying **[***19]** to what the State

[4] The State refers at various points in its brief to the results of a postconviction DNA test which Mr. Best requested pursuant to N.C.G.S. § 15A-269. results indicated an exact match between Mr. Best's DNA profile and that of a sperm fraction recovered from a vaginal swab of Mrs. Baldwin's body. While this result may be relevant to subsequent proceedings designed to prove Mr. Best's guilt or innocence, that is not the question before us now. Instead, we must decide whether Mr. Best's *original trial*, which took place in 1993, was procedurally fair. *See* United States v. Bagley, 473 U.S. 667, 678, 105 S. Ct. 3375, 3381, 87 L. Ed. 2d 481 (1985) ("[A] constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome *of the trial*." (emphasis added)); *see also* id. at 699, 105 S. Ct. at 3392 (Marshall, J., dissenting) ("[The Court] defines the right . . . by reference to the likely effect the evidence will have on the outcome of the trial."). Because the postconviction DNA test result identifying Mr. Best did not exist until decades after the trial took place, it could not have affected the outcome of the trial. As a result, we do not consider it here. We note also defense counsel's assertions that the test sample may have been contaminated—although, again, the test result does not factor into our analysis.

identifies as a principal piece of evidence—namely, that Mr. Best was spending the money stolen from the Baldwins.

The State argues that the undisclosed witness interview is not material because another witness, Tammy Rose Smith, testified that Mr. Best was spending money on 1 December 1991. However, according to the State, Ms. Smith testified that Mr. Best spent about two hundred dollars, and may have also paid for a hotel room. This is a far cry from the $1,800 that the State claims were stolen from the Baldwins. More importantly, it is a significant departure from the testimony of Ms. Troy, who testified at trial that she saw Mr. Best with $300 and saw him purchase $750 to $900 worth of drugs during the late night of Monday, 2 December 1991 and early morning of Tuesday, 3 December 1991. The State cannot credibly claim that the evidence undermining the testimony of Ms. Troy, who claimed that Mr. Best used over $1000 to buy drugs, is inconsequential because another witness testified that Mr. Best had about $200 and paid for a hotel room.[5]

[*351] While the other evidence identified by Mr. Best does not directly refute the DNA and fingerprint evidence presented **[***20]** at trial, it does undermine its persuasive effect. For **[**200]** example, because the State failed to disclose the lab notes for the luminol tests conducted in the Baldwins' home, the jury did not learn that the State found "shoe tracks" in the hallway and kitchen areas, suggesting that the assailant left bloody footprints during the attack. This increases the exculpatory relevance of the testimony, presented at trial, that Mr. Best's shoes were tested and found to be devoid of blood. Had these pieces of evidence been presented together, it is more likely that the jury may have concluded that Mr. Best was not in the home during the murders. Similarly, due to the State's failure to disclose, the jury never learned that the State had discovered 70 Caucasian hairs on the bodies of the victims which were not yet matched to anyone in the case. Mr. Best could have easily pointed out at trial that, as a Black man, he could not have left those hairs on the victims' bodies and underneath the fingernails of Mr. Baldwin. It also does not appear from the lab notes that the hairs were tested to see if they matched Ricky Winford. We do not conclude or suggest that this proves Mr. Best's innocence. Instead, **[***21]** we conclude only that this evidence creates a reasonable probability that the jury would have returned a different verdict had it been presented with the undisclosed evidence. *See* *Tirado, 358 N.C. at 589, 599 S.E.2d at 540* (stating that establishing prejudice requires a showing that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different" (quoting *Bagley, 473 U.S. at 682, 105 S. Ct. at 3383*)); *see also* *Smith, 565 U.S. at 75, 132 S. Ct. at 630* ("A reasonable probability does not mean that the defendant would more likely than not have received a different verdict with the evidence, only that the likelihood of a different result is great enough to undermine confidence in the outcome of the trial." (cleaned up)).

Not all of the withheld evidence described by Mr. Best is material. Mr. Best makes much in his brief of a statement in the fingerprint analyst's lab notes that "[t]he ridge detail on [the knife] was examined **[*352]** & determined to be of no value." As the State correctly points out, Mr. Best ignores the rest of the sentence, which clarifies that the ridge detail is not of value "[at] this time" and that a conclusive comparison will require "major case inked impressions." As to Mr. Best's fingerprint on the knife, then, the **[***22]** evidence highlighted by Mr. Best does not undercut the reliability of the fingerprint identification.

That being said, the evidence against Mr. Best is not as strong as the State claims it is. The State's evidence establishes that Mr. Best touched the knife while he had blood on his finger—Mr. Best testified at trial that he was using the knife to clean the gutters, which he had been hired to do that day, and had scraped the backs of his hands. While the dissent claims that the fingerprint on the knife consisted of Mr. Baldwin's blood, this claim is unsupported by the record.[6] While the jury certainly

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[5] The dissent refers to three additional persons who might have, but did not, testify that Mr. Best was spending money around the time the State argued the Baldwins were murdered. However, the question before us is whether there is a reasonable probability that the result of the proceeding would have been different if the undisclosed evidence had been provided to the defense. *State v. Tirado, 358 N.C. 551, 589, 599 S.E.2d 515, 540 (2004)*. As a result, we cannot speculate as to what evidence the State could have, but did not, put on. We must instead look to the record of the proceeding as it exists, and determine whether there is a reasonable probability that the outcome of *that* proceeding, rather than a hypothetical proceeding with stronger evidence from the State, would have changed with the undisclosed evidence. *Cf.* *Browning v. Trammell, 717 F.3d 1092, 1105 (10th Cir. 2013)* (confining *Brady* analysis "to the record before the state trial court").

[6] It appears that the dissent takes a stray statement from the

did not have to believe Mr. Best's testimony, the existence of a ready explanation for the fingerprint on the knife undermines the State's argument that the fingerprint is such overwhelming evidence so as to render harmless the State's failure to disclose other exculpatory evidence.

Finally, the State relies on the partial DNA match between Mr. Best and the semen recovered from Mrs. Baldwin. However, this evidence is similarly underwhelming. The State's expert testified that, regarding the reliability of the DNA match, one out of every eighteen African-American men would match the sample **[***23]** recovered from Mrs. Baldwin. To put that into perspective, out of every 90 African-American men, five would match the sample, but at least four of them would not be the actual source of the DNA sample. Typically DNA evidence is significantly **[**201]** more compelling. *See, e.g., State v. Honeycutt, 235 N.C. App. 656, 764 S.E.2d 699 (2014)* (stating that a DNA analysis of the victim's bedsheet indicated "a DNA match probability with defendant of one in 730 billion Caucasians, and her rape kit had a match probability with defendant of one in 36.2 billion Caucasians" and that another victim's "rape kit was consistent with defendant with a match probability of one in 16.2 million Caucasians"). Where, here, the DNA evidence presented at trial indicated that the tested DNA sample would match one out of **[*353]** every eighteen African-American men, we conclude that it is not nearly the overwhelming evidence that the State suggests it is.

While it is not relevant to our analysis on Mr. Best's *Brady* claim, Mr. Best also raised a claim of ineffective assistance of counsel which casts doubt on the State's timeline of events. At trial, the State relied upon the testimony of the Baldwins' daughter to establish that, based on the contents of Mrs. Baldwin's pillbox, the presence **[***24]** of newspapers on the Baldwins' front porch, and the fact that a light in the kitchen was on which Mr. Baldwin habitually turned on before retiring to bed, the Baldwins had been killed after 11 p.m. on 30 November 1991 and before Mr. Baldwin would have normally awoken the following morning. The State also presented testimony that Mr. Best was out at a nightclub at approximately 12:30 a.m. or 1:00 a.m. on 1 December 1991. The State, in its brief, argues that the killings must have occurred between 11:00 p.m. on 30 November 1991 and 12:30 a.m. on 1 December 1991:

> To sum up — all the physical evidence at the crime scene indicated the victims were killed after 11:00 p.m. Saturday night and before Mr. Baldwin went to bed, and certainly before the next morning. At some point between 12:30 am Sunday morning and 1:00 a.m. Sunday morning defendant was seen paying for hotel rooms, beer, and drugs with cash. Ms. Smith was called by defendant at trial and was the witness who testified about the large amount of cash spent by defendant after midnight Saturday night.

Mr. Best argued that effective trial counsel would have challenged this timeline, pointing out that the State's theory that Mr. Best killed **[***25]** the Baldwins required that the crime occur during an exceedingly narrow window of time, unsupported by expert testimony as to time of death. Mr. Best points to medical evidence gathered after conviction by postconviction counsel, which suggests the Baldwins did not die during the narrow window of time posited by the State. While the dissent views the State's evidence on this point as persuasive, the combination of (1) no medical evidence confirming the State's timeline and (2) the postconviction medical evidence suggesting that the State's timeline was inaccurate confirms our independent view that the State's evidence presented at trial was weak enough that there is a reasonable probability of a different outcome if the State had disclosed the exculpatory evidence.

We are not considering and do not decide whether Mr. Best received effective assistance of counsel during his original trial. Further, we cannot and do not decide that the production of this additional evidence **[*354]** postconviction supports a reasonable probability that the jury in Mr. Best's trial would have come to a different result if presented with evidence that the State failed to disclose. Instead, we mention Mr. Best's **[***26]** ineffective assistance of counsel claim, and the evidence supporting it, only to underscore the weakness of the State's case at trial, and the likelihood that the jury may have decided to acquit if it had been presented with all of the evidence.

Our decision is based upon Mr. Best's claim that the

State's brief and attempts to create a factual dispute in the evidence regarding the source of the blood that made up the fingerprint on the knife. Contrary to the dissent's assertion, the State's brief claims only that the knife had Mr. Baldwin's blood on it, not that the fingerprint was composed of Mr. Baldwin's blood. It is unsurprising that the State made no such claim, as Special Agent Lucy Milks, testifying for the State at Mr. Best's trial, stated that she tested the blood from the fingerprint and was able to determine only that it was blood—she was unable to determine a blood type, or even whether it was animal or human blood.

State failed to disclose material exculpatory evidence. We are sufficiently disturbed by the extent of the withheld evidence in this case, and by the materiality of that evidence, that it undermines our confidence in the jury's verdict. The exculpatory evidence withheld by the State for approximately twenty years was material. It either negated or cast doubt upon the principal evidence presented by the State at Mr. Best's trial. For that reason, we are of the opinion that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Tirado, 358 N.C. at 589, 599 S.E.2d at 540*.

[202]** We have not discussed all of the evidence which the State failed to disclose, but "we have no need to consider [Mr. Best's] arguments that the other undisclosed evidence also requires reversal under *Brady*." *Smith, 565 U.S. at 76, 132 S. Ct. at 631*. The undisclosed witness interview of Carolyn Troy and the undisclosed **[***27]** forensic evidence, particularly the unidentified Caucasian hairs and luminol test notes indicating the presence of bloody shoe tracks, are sufficiently material. When considered against the facts that (1) the State relied heavily on the testimony of Ms. Troy that Mr. Best was spending the proceeds of the robbery on drugs; (2) Mr. Best is not white and could not have contributed the "Caucasian" hairs recovered from the crime scene, while no "Negroid" hairs were recovered; and (3) Mr. Best's shoes were tested and revealed no traces of blood, there is a reasonable probability that the jury would have returned a different verdict if presented with the undisclosed evidence.

Conclusion

We have not decided today that Mr. Best is guilty or innocent, that the district attorney was right or wrong to charge him, or that Mr. Best should be convicted or acquitted on retrial. Instead, our review of the record in this case shows that the failure to disclose exculpatory evidence prejudiced Mr. Best's ability to present a defense. Every criminal defendant in this state is entitled to a fair trial with full opportunity to confront the evidence against him and to attempt to rebut the charges of which he **[***28]** is accused. The state and federal constitutional guarantees **[*355]** of due process require that the State turn over favorable evidence that is material to the defendant's guilt or punishment prior to trial. That did not happen in this case. Accordingly, we reverse the superior court's denial of Mr. Best's motion for appropriate relief and remand this case to the Superior Court, Bladen County, with instructions to grant the motion and order a new trial.

REVERSED AND REMANDED.

Justice ERVIN did not participate in the consideration or decision of this case.

Dissent by: NEWBY

Dissent

Justice NEWBY dissenting.

The issue in this case is whether evidence that the State presumably should have disclosed before defendant's trial under *Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)*, creates a reasonable probability of a different outcome of that trial. Because the undisclosed evidence is not sufficient to undermine the substantial evidence of defendant's guilt presented at trial, any *Brady* violation did not meet the standard of being prejudicial to defendant. The majority inflates the significance of vague undisclosed evidence and improperly minimizes the weight of the State's strong evidence presented at trial. The majority seems to find facts, weighing conflicting evidence **[***29]** in the light most favorable to defendant. The decision of the superior court denying defendant's motion for appropriate relief should be affirmed. I respectfully dissent.

Due process guards a defendant's right to a fair trial free from prejudicial error. The State may deprive a defendant of due process when it fails to disclose evidence that is favorable to the defendant and material to the defendant's guilt or punishment. *Smith v. Cain, 565 U.S. 73, 75, 132 S. Ct. 627, 630, 181 L. Ed. 2d 571 (2012)*. As the majority notes, however, not every failure to disclose amounts to a constitutional violation. Instead, a defendant also must show that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383, 87 L. Ed. 2d 481 (1985)*.

The following evidence presented at trial supported defendant's conviction and sentencing: Eighty-two-year-old Leslie Baldwin met defendant at a gas station the evening of 29 November 1991. The details of their encounter are unclear, but the evidence shows that Mr.

Baldwin hired defendant to perform yard work for him the next day. Defendant **[*356]** walked to the home of Mr. Baldwin and his wife, seventy-nine-year-old Gertrude Baldwin, on 30 November 1991. He performed yard work, including **[***30]** cleaning the gutters. Mr. Baldwin fed him lunch. At the completion of defendant's work, Mr. Baldwin paid him $30.

[203]** Mr. and Mrs. Baldwin were then murdered—Mr. Baldwin by a cut to his carotid artery on his neck and other trauma and Mrs. Baldwin by blunt force trauma to her head and multiple knife wounds. The State put on substantial evidence that the murders occurred the night of defendant's work at the victims' home. Specifically, testimony indicated that Mrs. Baldwin's niece spoke to her on the phone at 7:00 p.m. that evening and that Mrs. Baldwin's medication dose, which she habitually took at 11:00 p.m. before going to bed, was gone when the bodies were later discovered. Testimony also showed that the 1 December 1991 newspaper, which Mr. Baldwin typically would have retrieved by around 5:00 a.m. that day, was still on the front porch, along with the papers for the following few days. Thus, evidence showed that the Baldwins were likely killed late at night on 30 November 1991 or very early in the morning on 1 December 1991.

Mrs. Baldwin was also raped, and the evidence at trial showed a DNA sample taken from her vaginal swab matched defendant's DNA.[1] A paring knife found at the crime **[***31]** scene, under Mr. Baldwin's body and covered in his blood, bore a fingerprint in the blood that matched defendant's print.

Defendant claimed that the bloody print came from him using a similar knife to clean gutters, and that during that process, he scraped the back of his hand. Defendant alleges that the scrapes on the back of his hand would have produced the blood for the fingerprint later found on the knife. But defendant's testimony is undermined by the fact that his bloody fingerprint was placed on the pairing knife since it was last washed. Further, testimony indicated that the paring knife was typically stored in a kitchen drawer and that Mr. Baldwin never used kitchen utensils for yard work.

The Baldwins were also robbed of between one and two thousand dollars cash, some of which consisted of one-hundred-dollar bills. Witness testimony indicated that defendant possessed several **[*357]** one-hundred-dollar bills after the murders, spent one hundred dollars on cocaine just hours after the murders, and spent several hundred dollars more on cocaine within a couple days of the murders. When defendant filed this motion for appropriate relief over twenty years later, alleging certain evidence **[***32]** not disclosed before trial could have been used for his benefit, the superior court determined any nondisclosed evidence could not create a reasonable probability that the evidence's disclosure would have produced a different result. The superior court thus denied his motion.

The majority reverses that decision and awards defendant a new trial nearly thirty years after this tragedy. It does so because in its view the evidence defendant presents that was not disclosed by the State before the trial would have a reasonable probability of bringing about a different trial outcome. The evidence defendant identifies would not do so. It does not begin to outweigh the evidence the jury considered at trial that is highly probative of defendant's guilt.

First, the majority properly rejects defendant's argument that the State failed to disclose evidence related to defendant's bloody fingerprint on the knife. Although records indicate that the print was not useful on its own at first, an analyst went on to explain how the print was eventually evaluated and found to be a match with defendant. This evidence does not benefit defendant; thus, it cannot serve as a foundation for establishing a *Brady* violation. **[***33]**

Second, defendant asserts that the State's failure to disclose evidence of two other potential culprits prejudiced his defense. The majority does not appear to give this evidence much weight. Rightly so, because one of the potential suspects was incarcerated during the time the murders likely occurred, and the other was excluded as a possible source of the DNA found from Mrs. Baldwin's vaginal swab.

[204]** Next, defendant argues that the State improperly withheld evidence from a witness interview with Carolyn Troy. Troy testified at trial that defendant spent hundreds of dollars a couple nights after the murders, but the prior witness interview indicates that Troy originally stated defendant had around $40 on his person on that same night. The majority claims that this evidence could have been used to impeach Troy's

[1] The DNA test ruled out about a 99.7% of unrelated members of North Carolina's Caucasian population, about 99.7% of the Lumbee population, and about 94.4% of the Black population. A second DNA test conducted at defendant's request showed a 100% match to defendant. While not considered in this *Brady* analysis, the second DNA test further confirms the reliability of the first test.

testimony, which helped the State show that defendant was spending money he stole from the Baldwins.

There are two problems with the majority's position. First, in addition to Troy's testimony, the State was able to present testimony from Tammy Rose Smith, who testified that defendant spent a couple hundred **[*358]** dollars or more just a couple hours after the crime likely occurred. The **[***34]** majority sidesteps this evidence and says that amount "is a far cry from the $1,800[2] that the State claims were stolen from the Baldwins." That response is unsatisfying. The evidence shows that defendant spent one-hundred dollar bills shortly after the robbery. That testimony is probative enough in its own right. There is no reason whatsoever to expect that someone who stole over one thousand dollars would spend the entirety of that sum only hours after acquiring it. Second, Troy's later testimony went into far greater detail about the large bills defendant possessed and the sums he spent on various purchases. This more detailed testimony would likely weaken the impact of any vague earlier statement she made. Therefore, a jury would still have substantial reason to believe Troy's subsequent testimony, and the State had presented other evidence of defendant's substantial spending after the crime on which it could rely even if Troy's testimony were undermined. Additionally, the SBI interviewed three other people who gave witness statements about defendant possessing one-hundred-dollar bills and spending them on cocaine. Thus, if the evidence of defendant's possession and spending of cash **[***35]** presented at trial had been at all questioned, these other three witnesses were available to support the State's case.

The majority also relies on undisclosed luminol tests and hair follicle samples. But these pieces of potential evidence have minimal probative value at best. The luminol tests indicated that bloody footprints were found in the home. The majority suggests that if such prints were found, then blood perhaps should have been found on defendant's shoes after the crime. The hair follicle collections revealed Caucasian hairs on the victims' bodies which could not have been left by defendant, who is Black. Yet, DNA testing and fingerprint analysis are well known to be more probative than hair follicle comparisons. Moreover, it is unclear that reports of Caucasian hair particles found on the victims would be helpful to defendant. The DNA test implicating defendant left only a 0.3% chance that the DNA left by the rapist belonged to a Caucasian person. Despite the fact that the footprints and the hair follicles do not point to anyone in particular, however, it is key that the DNA testing and fingerprint evidence *did* specifically implicate defendant. Evidence that implicates no **[***36]** one does not invalidate or even significantly undermine solid evidence that implicates one person. Therefore, any introduction of evidence not pointing to a specific individual does not raise a **[*359]** reasonable probability that a different result would have been reached at trial, especially considering the two pieces of evidence that specifically implicate defendant.

In light of the strength of the evidence from the DNA and fingerprint testing, the majority finally resorts to attacking those things. Though the majority cannot point to any new evidence that would undermine the credibility of either the DNA test or the bloody fingerprint, it asserts that "the evidence against Mr. Best is not as strong as the State claims it is." As to the fingerprint, the majority states that defendant testified at trial that his bloody fingerprint was on the knife because he used a similar one to clean the gutters and scraped the back of his hand, meaning he could have touched the knife while he had blood on his fingers. The majority admits that defendant already tried this **[**205]** explanation at trial and that the jury did not have to believe him. Indeed, it would be implausible for the jury to believe him because **[***37]** the knife (1) bore defendant's fingerprint in Mr. Baldwin's blood after the knife had just been washed; (2) was found underneath the body of Mr. Baldwin, whose neck was sliced open;[3] and (3) rarely left the kitchen and was not used for yard work. But the majority nonetheless considers defendant's bare assertion significant as evidence that could undermine the State's case.

The majority then, confusingly, describes the DNA test results directly implicating defendant as "similarly underwhelming." It notes that "[t]he State's expert testified that, regarding the reliability of the DNA match,

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[2] It is unclear precisely how much money was stolen from the Baldwins, but testimony indicates that about $1000 was likely stolen from Mr. Baldwin and as much as $800 from Mrs. Baldwin.

[3] The majority contests whose blood was on the knife as well as the location of the knife. The State reiterated multiple times throughout this case and in its brief that the blood found on the knife was Mr. Baldwin's and that the knife was found under the victim. If there is a dispute over this evidence, this dispute should be resolved by the trial court. The majority states that it is not their job to weigh facts or find evidence, but that is exactly what the majority does here by making a finding about the placement of the knife.

one out of every eighteen African-American men would match the sample recovered from Mrs. Baldwin." Stated another way, the DNA test revealed that if defendant were being falsely accused, there is only a one-in-eighteen chance, just over a five-percent chance, that he would be a match to the sample taken from Mrs. Baldwin's vaginal swab. Thus, the DNA test alone (without even considering the other evidence of defendant's guilt) presents a high likelihood that he raped Mrs. Baldwin. Of course, on top of that, defendant has been unable to point to a plausible alternative suspect of the same race to whom **[***38]** the DNA sample could belong. The majority simply asserts, contrary to logic and evidence, that the incriminating result of the DNA test is underwhelming.

[*360] The majority's ultimate contention is that, in its view, the State's evidence presented at trial is weak, and thus there is a reasonable probability the withheld evidence defendant identifies, had it been disclosed, would have produced a different result in the proceeding. But the evidence the State presented at trial is indeed strong, and the evidence defendant argues should be included is weak. The State has shown: a statistically reliable DNA test directly implicating defendant as Mrs. Baldwin's rapist; defendant's bloody fingerprint on a likely murder weapon; uncontradicted testimony that defendant was at the Baldwin's home before the crime; and testimony that defendant possessed and spent considerable sums of cash soon after the Baldwins were robbed of a considerable sum of cash. Defendant, on the other hand, has only: minimally called into question just one witness's statement as to precisely how much cash defendant carried a couple days after the murders; pointed to two other potential culprits, whom the evidence has generally **[***39]** ruled out as the assailants; and identified some tests and samples that do not implicate defendant (or anyone else in particular). As the superior court determined, a rational jury would not conclude that any reasonable doubt existed as to defendant's guilt.[4]

Thus, even if the additional evidence to which defendant points had been available for trial, there is not a reasonably probability that the jury would have reached a different result. Holding otherwise, the majority weighs the evidence in favor of defendant, inappropriately attempts to undermine strong evidence supporting the State's case, and inflates the significance of flimsy evidence defendant uncovered later. If there is a conflict in the evidence, this issue should be remanded to the trial court. The superior **[**206]** court's denial of defendant's motion for appropriate relief should be affirmed. I respectfully dissent.[5]

End of Document

[4] The evidence here indicates that the knife was found under the victim. The State reiterated this point multiple times throughout the case and in its brief. If there is a dispute over this evidence, this dispute should be resolved by the trial court. The majority states that it is not their job to weigh facts or find evidence, but that is exactly what the majority does here by making a finding about the placement of the knife.

[5] Defendant also asserts that his trial counsel's representation was unconstitutionally deficient. I disagree. Defendant has not shown either that his trial counsel was not functioning as the "counsel" guaranteed by the *Sixth Amendment* or that there is a reasonable probability that, but for counsel's purported errors, the result of the proceeding likely would have been different. *See Strickland v. Washington, 466 U.S. 668, 687-96, 104 S. Ct. 2052, 2064-69, 80 L. Ed. 2d 674 (1984)*.

STATE OF NORTH CAROLINA — IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
BLADEN COUNTY — Nos. 93 CRS 2621-22

STATE OF NORTH CAROLINA)
)
v.) ORDER
)
NORFOLK JUNIOR BEST,)
Defendant.)

THIS MATTER coming on to be heard before the undersigned Superior Court Judge upon defendant's Norfolk Junior Best's Second Motion for Appropriate Relief (MAR 2) filed on or about 16 January 2014; as well as the State's Answer & Motion for Judgment on the Pleadings to Defendant's Second Motion for Appropriate Relief, and after reviewing the documents attached thereto and reviewing the record proper, the Court makes the following Findings of Fact and Conclusions of Law:

PROCEDURAL HISTORY

1. Norfolk Junior Best was sentenced to death at the 17 May 1993 Special Criminal Session of the Superior Court of Bladen County by the Honorable Robert H. Hobgood, Judge Presiding, after being convicted of the first degree murder and first degree rape of Gertrude Singletary Baldwin, the first degree murder of her husband, Leslie Lennon Baldwin, the first degree burglary of the Baldwins' home, and the armed robbery of the Baldwins.

2. The North Carolina Supreme Court affirmed the convictions

and sentences. State v. Best, 342 N.C. 502, 467 S.E.2d 45 (1996) The United States Supreme Court denied Best's petition for a writ of certiorari. Best v. North Carolina, 519 U.S.878, 117 S. Ct. 203, 136 L.Ed.2d 139 (1996).

3. On or about 29 August 1997, the defendant filed his Motion for Appropriate Relief in Bladen County Superior Court. On or about 16 October 1997, the defendant filed his First Amended Motion for Appropriate Relief. On 23 March 1998, an evidentiary hearing was held before the Honorable D. Jack Hooks, Jr., presiding Superior Court Judge. At the hearing, the defendant amended his First Amended Motion for Appropriate Relief. The MAR court issued its written Order on 24 April 1998, which denied the defendant's Motion in its entirety.

4. This latest Motion for Appropriate Relief, titled "Motion for Appropriate Relief (Second)" was filed on or about 16 January 2014.

5. The Bladen County District Attorney is representing the State in Bladen County Superior Court in defendant's claims based on alleged mental retardation pursuant to N.C. Gen. Stat. § 15A-2006 (post conviction claims of mental retardation) and N.C. Gen. Stat. § 15A-2005 (definition of mental retardation). Those claims are pending before this Court and are not addressed by this Order.

6. Best has also filed a motion for appropriate relief under

the North Carolina Racial Justice Act (RJA) and an amended motion for appropriate relief under the amended RJA. Those motions are pending before this Court and are not addressed by this Order.

CLAIMS RAISED IN MAR 2

First Claim

7. In his MAR2 Claim I, Best claims that he is entitled to a new trial because the state wrongfully concealed exculpatory evidence regarding (a) two alternate suspects (b) exculpatory forensic testing results and (c) key evidence undermining its theory of motive and identity.

8. Best has failed to show the existence of the asserted ground for relief. N.C. Gen Stat. § 15A-1420(c)(6); Brady v. Maryland, 373 U.S. 83 (1963); State v. Strickland, 346 N.C. 443, 488 S.E.2d 194 (1997).

9. In the present case there was overwhelming evidence at trial against defendant and none of the alleged Brady material would have amounted to a reasonable probability of a different result. Therefore, defendant's Brady claim must fail. Strickland at 457, 488 S.E.2d at 202.

10. In post-conviction, the overwhelming evidence presented at trial was not refuted or weakened. Instead the post-conviction DNA removed any doubt, reasonable or unreasonable, of defendant's guilt. Both experts testified in post-conviction that the sperm fraction, not the skin fraction, taken from the rape/murder victim

was an exact match for defendant's DNA profile. (See 11 April 2016 Post-conviction hearing transcript pp. 56 [testimony of Maher Noureddine] and 68 [testimony of Mark Boodee].)

11. Given the evidence showing defendant's guilt presented at trial, none of the complained of evidence in Claim I, if turned over could have amounted to a reasonable probability of a different result. Additionally, the post-conviction DNA testing results further illustrate the lack of any possible prejudice.

12. As this Court can determine from the motion and any supporting or opposing information presented that this claim is without merit, an evidentiary hearing is not necessary to decide the issues raised in this claim. N.C. Gen. Stat. § 15A-1420(c)(1) and State v. McHone, 348 N.C. 254, 257, 499 S.E.2d 761, 762-63 (1998), cert. denied, 528 U.S. 1095, 120 S. Ct. 835, 145 L. Ed. 2d 702 (2000).

Second Claim

13. In his MAR2 Claim II, Best claims that he is entitled to a new trial because the state misled the jury on the victim's time of death. Best argues that (a) two experts hired in post-conviction claims the time of death was different than the State argued at trial (b) the Prosecution theory of on time of death was contradicted by evidence known the prosecution at trial (c) and alternatively, he received ineffective assistance of counsel regarding time of death at trial.

14. Best has failed to show the existence of the asserted ground for relief. N.C. Gen Stat. § 15A-1420(c)(6); Napue v. Illinois, 360 U.S. 264, 269, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959); State v. Braswell, 312 N.C. 553, 324 S.E.2d 241 (1985).

15. While defendant has submitted affidavits arguing for a different time of death for the victims, the evidence at the crime scene indicated the victims were killed after 11:00 Saturday night and before Mr. Baldwin went to bed, and certainly before the next morning. Subsequently, between 12:30 am Sunday morning and 1:00 am Sunday morning, defendant was seen paying for hotel rooms, beer and drugs with cash.

16. Mere inconsistencies in evidence and testimony do not establish use of false testimony. Napue at 269. From a review of the claims made by defendant, it is clear he has not shown any use of perjured testimony. U.S. v. Griley, 814 F. 2d 967, 971 (4th Cir. 1987) ("A defendant seeking to vacate a conviction based on perjured testimony must show that the testimony was, indeed, perjured.") Defendant's Napue claim is completely without merit.

17. Defendant has also not shown any ineffective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, he must show that counsel's performance was 1) deficient and 2) that such deficiency so prejudiced him as to deprive him of a fair trial whose result was reliable. State v. Braswell, 312 N.C. 553, 324 S.E.2d 241 (1985)

18. While defendant has not shown deficient performance, this Court can resolve this issue solely on defendant's failure to show any prejudice. Strickland, 466 U.S. at 696, 104 S.Ct. at 2069, 80 L. Ed. 2d at 699. There was substantial evidence presented at trial showing it was likely the victims were killed Saturday night after 11:00 pm or in the early hours of Sunday, in any event before Sunday morning. Nothing trial counsel could do would eliminate that evidence. Secondly, there was expert testimony at trial that the DNA banding pattern from the defendant matched the DNA banding pattern of the semen found in Mrs. Baldwin's vagina after her death.

19. Given the evidence showing defendant's guilt presented at trial, there was no prejudice resulting from trial counsel's actions surrounding the time of the murders by defendant. Additionally, the post-conviction DNA testing results further illustrate the lack of any possible prejudice. Defendant's Stickland claim is completely without merit.

20. As this Court can determine from the motion and any supporting or opposing information presented that this claim is without merit, an evidentiary hearing is not necessary to decide the issues raised in this claim. N.C. Gen. Stat. § 15A-1420(c)(1) and State v. McHone, 348 N.C. 254, 257, 499 S.E.2d 761, 762-63 (1998), cert. denied, 528 U.S. 1095, 120 S. Ct. 835, 145 L. Ed. 2d 702 (2000).

Third Claim

21. In his MAR2 Claim III, Best claims that he is entitled to a new trial because the State presented false and misleading DNA evidence. Best argues that (a) the SBI's DNA testing was fatally flawed and that there was no DNA match with defendant (b) and alternatively, he received ineffective assistance of counsel regarding trial counsel's failure to expose basic errors in DNA evidence.

22. Best has failed to show the existence of the asserted ground for relief. N.C. Gen Stat. § 15A-1420(c)(6). The same DNA expert (Dr. Noureddine) who submitted an affidavit signed in 2013 in support of this claim, also testified for defendant at the later 2016 hearing on defendant's post-conviction DNA testing motion under N.C. Gen. Stat. § 15A-269.

23. At the 2016 hearing, Dr. Noureddine testified that there was only one male DNA profile from the rape kit swabs and that profile from the swabs was an exact match for defendant's DNA profile. (HT p. 56, testimony of Maher Noureddine) The expert called by the State at that same hearing also testified that the profile was an exact match for defendant's profile. (HT p. 68, testimony of Mark Boodee)

24. The testing done in post-conviction, upon defendant's motion under N.C. Gen. Stat. § 15A-269, did not undermine or cast doubt on the expert testimony regarding DNA presented by the State

at trial. Instead, the post-conviction testing confirmed the testimony at trial presented by the State and removed any doubt, reasonable or unreasonable, of defendant's guilt. The testimony of both experts was that the sperm fraction, not the skin fraction, taken from the rape/murder victim's body was an exact match for defendant's DNA profile.

25. As this Court can determine from the motion and any supporting or opposing information presented that this claim is without merit, an evidentiary hearing is not necessary to decide the issues raised in this claim. N.C. Gen. Stat. § 15A-1420(c)(1) and State v. McHone, 348 N.C. 254, 257, 499 S.E.2d 761, 762-63 (1998), cert. denied, 528 U.S. 1095, 120 S. Ct. 835, 145 L. Ed. 2d 702 (2000).

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law it is ORDERED that:

1. Best's Second Motion for Appropriate Relief, filed on or about 16 January 2014, is DENIED;

2. the State's Motion for Judgment on the Pleadings is ALLOWED;

3. the Clerk of Court is to provide a copy of this ORDER to the District Attorney, the Special Deputy Attorney General representing the State, and to post-conviction counsel.

SO ORDERED, this the 18th day of January, 2018.

The Honorable Douglas B. Sasser, Sr.
Senior Resident Superior Court Judge

FILED
2018 JAN 23 A 10:00
BLADEN CO. C.S.C.

A TRUE COPY
CLERK OF SUPERIOR COURT
BLADEN COUNTY
BY Sheila Brown
Assistant Deputy

State v. Best

Supreme Court of North Carolina

March 15, 1995, Heard In The Supreme Court ; February 9, 1996, Decided

No. 300A93 - Bladen

Reporter
342 N.C. 502 *; 467 S.E.2d 45 **; 1996 N.C. LEXIS 7 ***

STATE OF NORTH CAROLINA v. NORFOLK JUNIOR BEST

Subsequent History: US Supreme Court certiorari denied by *Best v. North Carolina, 519 U.S. 878, 117 S. Ct. 203, 136 L. Ed. 2d 139, 1996 U.S. LEXIS 5631 (Oct. 7, 1996)*

Post-conviction relief granted at, Remanded by *State v. Best, 2020 N.C. LEXIS 1138, 2020 WL 7416360 (N.C., Dec. 18, 2020)*

Prior History: [*1]** Appeal as of right pursuant to *N.C.G.S. § 7A-27(a)* from judgments imposing sentences of death entered by Hobgood, J., at the 17 May 1993 Special Criminal Session of Superior Court, Bladen County, upon verdicts of guilty on two counts of first-degree murder. The defendant's motion to bypass the Court of Appeals as to his convictions of first-degree burglary, first-degree rape, and robbery with a dangerous weapon was allowed by this Court on 19 July 1994.

Disposition: NO ERROR.

Syllabus

The defendant was tried on two charges of first-degree murder and one charge each of first-degree burglary, robbery with a dangerous weapon, and first-degree rape. The State's evidence showed that Leslie Baldwin and his wife, Gertrude Baldwin, were eighty-two and seventy-nine years of age, respectively. They were killed in their home during the night of 30 November 1993. Earlier that day, the defendant had done yard work for them.

Mr. Baldwin died as a result of the cutting of his carotid artery, and Mrs. Baldwin died of blunt-force trauma to the head. Money was missing from Mr. Baldwin's wallet and from Mrs. Baldwin's purse. The defendant's DNA matched one of the semen samples taken from Mrs. Baldwin, and his **[***2]** fingerprint matched one on a paring knife found beside Mr. Baldwin's body. The defendant bought between $ 700 and $ 1,000 worth of crack cocaine within two days after the killings.

The defendant was found guilty of all charges. After a sentencing hearing, the jury recommended that the death penalty be imposed on both convictions of murder, which sentences were imposed. The defendant was also sentenced to fifty years in prison for first-degree burglary, life in prison for first-degree rape, and forty years in prison for robbery with a dangerous weapon. The prison sentences are to be served consecutively.

The defendant appealed.

Counsel: Michael F. Easley, Attorney General, by Thomas S. Hicks, Assistant Attorney General, for the State.

Henderson Hill, Director, North Carolina Resource Center, Office of the Appellate Defender, by Marshall Dayan, Senior Staff Attorney, for defendant-appellant.

Judges: WEBB, Justice.

Opinion by: WEBB

Opinion

[*509] **[**50]** WEBB, Justice.

The defendant first assigns error to the denial of his motion for a change of venue to either New Hanover County or Brunswick County. The crimes involved in this case occurred in Columbus County. The defendant made a motion to change the venue **[***3]** to Bladen, New Hanover, or Brunswick County. The motion was allowed, and the trial was moved to Bladen County after the court found "there has been a great deal of word of mouth publicity concerning this case" and "numerous newspaper articles and editorials . . . including a recital of all previous convictions of the defendant as well as charges filed against him whether or not convicted."

The defendant then made a motion for a second change of venue to either New Hanover or Brunswick County which was denied. The defendant says this was error. He contends that Bladen County is a small county contiguous to Columbus County with the same newspapers and television stations serving both counties. He contends that if he could not receive a fair trial in Columbus County, he could not receive a fair trial in Bladen County. He argues that he was entitled to **[*510]** take advantage of the findings of fact in the order moving the case from Columbus County in the determination of his motion to change the venue from Bladen County. We presume the court in Bladen County considered the order in Columbus County, but it was not bound by it. The court in Bladen County could make a determination as to whether **[***4]** a fair trial could be had in Bladen County.

N.C.G.S. § 15A-957 provides that if there is so great a prejudice against a defendant in the county in which he is charged that he cannot receive a fair trial, the court must transfer the case to another county or order a special venire from another county. The purpose of this statute is to insure that jurors decide cases on evidence introduced at trial and not on something they have learned outside the courtroom. State v. Moore, 335 N.C. 567, 440 S.E.2d 797 (1994); State v. Gardner, 311 N.C. 489, 319 S.E.2d 591 (1984), *cert. denied*, *469 U.S. 1230, 84 L. Ed. 2d 369, 105 S. Ct. 1232 (1985)*. In most cases a showing of identifiable prejudice to the defendant must be made, and relevant to this inquiry is testimony by potential jurors that they can decide the case based on evidence presented and not on information received outside the courtroom. State v. Abbott, 320 N.C. 475, 358 S.E.2d 365 (1987).

In the hearing on the motion to move the case from Bladen County, the defendant introduced articles and editorials from newspapers from Columbus, Bladen, and New Hanover counties, as well as an affidavit indicating that news broadcasts on television **[***5]** stations had reported the case but not what was contained in the broadcasts. The newspaper articles, except for the editorials, were reports of facts involved in the case. There **[**51]** was no evidence, as there had been in the hearing on the motion to move the case from Columbus County, of widespread knowledge concerning the case.

We cannot hold, based on the evidence presented at the hearing, that there was error in denying the motion for a change of venue. This conclusion is reinforced by the answers given by the jurors during the selection of the jury. Six of those selected to serve had not heard of the case. Four of the jurors selected had seen something about the case on television, but each said he or she had not formed an opinion about it. Two of the jurors had read something about the case in a newspaper but had formed no opinion about it. We are confident the defendant was tried by a jury which was not influenced by information received outside the courtroom.

This assignment of error is overruled.

[*511] The defendant, who is black, next assigns error to the overruling of his objection to the allowance of peremptory challenges by the State of six potential black jurors. He says his **[***6]** constitutional rights as delineated in Batson v. Kentucky, 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712 (1986), were violated by this action. When an objection is made to the exercise of a peremptory challenge on the ground that the challenge is racially motivated, the trial judge must first determine whether the objecting party has made a *prima facie* case of discrimination. If the court determines he has done so, the proponent of the strike must come forward with a racially neutral explanation. The explanation may be implausible or even fantastic, but if it is racially neutral the opponent of the challenge has satisfied his requirement in this step in the process. If the court finds that the explanation is racially neutral, it must then

determine whether the challenge was racially motivated. The burden of proof is on the party objecting to the challenge, and the determination of the question of racial motivation is a finding of fact entitled to great deference by an appellate court. *Purkett v. Elem*, ___ U.S. ___, *131 L. Ed. 2d 834 (1995)*; *Hernandez v. New York, 500 U.S. 352, 114 L. Ed. 2d 395, 111 S. Ct. 1859 (1991)*.

When the defendant objected to the peremptory challenges, the prosecutor gave his **[***7]** reasons for exercising them without a ruling by the court that the defendant had made a *prima facie* showing of racial discrimination. We shall examine this assignment of error as if such a finding had been made as to each venireman. *See Hernandez v. New York, 500 U.S. at 363, 114 L. Ed. 2d at 405*.

The State exercised six peremptory challenges against blacks while the jury was being selected and one such challenge while two alternate jurors were being selected. The first potential black juror peremptorily challenged was Lori Featherson. The prosecuting attorney stated as his reasons for exercising the challenge that Ms. Featherson had seen the defendant although she did not know him, that he perceived that she had difficulty in expressing her opinion as to the death penalty, and that an assistant district attorney had prosecuted her grandfather. The court found from the record that Ms. Featherson stated that she had seen the defendant; that from the court's personal observation, she was hesitant in responding to questions regarding the death penalty; and that Ms. Featherson stated she had family members who had been prosecuted by the district attorney. The court held that the **[***8]** defendant had not carried his burden of showing that the challenge to Ms. Featherson was racially discriminatory.

[*512] The second potential black juror peremptorily challenged by the State was Vontea Horton. The State gave as its reason for the challenge that she was opposed to the death penalty although not to the extent that she could be challenged for cause. The court found Ms. Horton had stated she was opposed to the death penalty but could consider voting for the death penalty. The court found further that this challenge was not racially discriminatory and overruled the defendant's objection to it.

The third black venireman peremptorily challenged by the State was Nathan Swindell. The State gave as its reason for this challenge that Mr. Swindell had been convicted of an Employment Security Commission **[**52]** fraud and was serving a probationary sentence for it. The court found this challenge was not racially motivated and overruled the objection to it.

The fourth potential black juror peremptorily challenged by the State was Shirley Shaw. The State gave as its reason for the challenge that she had "expressed that she was against the death penalty, and she was very hesitant about her ability **[***9]** to be able to vote for the death penalty." The court found that she had said she was against the death penalty. It found further that the challenge was not racially motivated and overruled the defendant's objection to it.

The fifth potential black juror as to whom the State exercised a peremptory challenge was Lula Corbett. The State gave as its reason for exercising this challenge that she was a friend of a man charged with murder who would be prosecuted by the district attorney's office that was prosecuting this case. The court found that this prospective juror had stated that she was a friend of a person who was charged with murder. It further found that the challenge by the State was not racially motivated and overruled the objection to the challenge.

The sixth potential black juror peremptorily challenged by the State was Rosa Lewis. The prosecuting attorney articulated as his reason for exercising the challenge that she had indicated that she was against the death penalty but would "go along with what the rest of the jurors would do." The court found that Ms. Lewis had so stated and found further that the challenge was not racially motivated. The defendant's objection to **[***10]** the challenge was overruled.

The prospective black alternate juror peremptorily challenged by the State was Shelbin Simpson. The State gave as its reason for the **[*513]** challenge that Ms. Simpson stated she had strong religious beliefs against the death penalty and went "back and forth" on her position on the death penalty. The court found that the proposed juror had so said and found that this challenge was not racially motivated. The defendant's objection to this challenge was overruled.

We cannot find error in the rulings by the court on the peremptory challenges. The State articulated its reasons for the challenges without a finding that the defendant had made a *prima facie* showing of racial discrimination. The court found that all the reasons for the challenges articulated by the State were racially neutral. The court then held as to each challenge that

the challenges were not racially motivated. Giving this finding of fact great deference, as we are required to do, we cannot hold it was error for the court to rule as it did.

The defendant argues under this assignment of error that the prosecution's exercise of twelve of fourteen peremptory challenges against women makes a **[***11]** *prima facie* case of gender discrimination. *J.E.B. v. Alabama ex rel. T.B.*, ___ U.S. ___, 128 L. Ed. 2d 89 (1994). He asks that we remand the case to superior court for a hearing as to whether there was gender discrimination in the selection of the jury.

The defendant also argues that the peremptory challenges by the State of seven of nine African-American women establish a *prima facie* case of discrimination against African-American women. He asks for a hearing in superior court on this matter.

The defendant did not object to any of the peremptory challenges on the ground of discrimination against women or African-American women. He cannot raise the question for the first time on appeal. State v. Williams, 308 N.C. 47, 301 S.E.2d 335, *cert. denied*, *464 U.S. 865, 78 L. Ed. 2d 177, 104 S. Ct. 202 (1983)*.

This assignment of error is overruled.

The defendant next assigns error to the admission of expert testimony from an agent of the State Bureau of Investigation. The agent, without objection by the defendant, was found to be an expert in DNA analysis. He testified he had performed tests by comparing the DNA from semen found in Mrs. Baldwin's vagina with DNA from blood taken from **[***12]** the defendant. The SBI agent testified that the DNA sample taken from the semen was degraded and was difficult to separate from the DNA from the victim's blood. He testified that the tests **[**53]** were inconclusive in that they did "not count[] [the defendant] out" and **[*514]** that the tests would eliminate approximately ninety-four of one hundred people from the black population.

The defendant contends it was error to admit this "skewed and patently unreliable DNA evidence." This testimony was relevant, as it made it more likely that the defendant was guilty if ninety-four of one hundred persons in the black population were excluded by the DNA test, and the defendant was not. The weight of the evidence was for the jury.

This assignment of error is overruled.

The defendant next assigns error to the denial of his motion to dismiss the charge of first-degree rape. We disagree. The DNA expert testified that the semen taken from the vagina of Mrs. Baldwin was not from Mr. Baldwin. This is evidence from which the jury could find that someone other than her husband penetrated Mrs. Baldwin. The injuries she sustained, including the defensive wounds on her hands, the cuts on her neck and chest, and **[***13]** the multiple injuries to her face and head, are evidence from which the jury could find the penetration was not consensual. The defendant's identity as the perpetrator of the crime is established by his fingerprint on the knife found next to the body of Mr. Baldwin. Any discrepancies in the evidence were for the jury to resolve. State v. Powell, 299 N.C. 95, 261 S.E.2d 114 (1980).

This assignment of error is overruled.

The defendant next contends that it was error to allow certain testimony by the decedents' daughter. The defendant did not object to this testimony, and we must examine this assignment of error under the plain error rule. State v. Odom, 307 N.C. 655, 300 S.E.2d 375 (1983). Betsy Baldwin Marlowe, the decedents' daughter, testified that she knew her father's habit of keeping in an envelope in his wallet approximately $ 1,000 he had received from the settlement of an insurance claim. Ms. Marlowe also testified that her mother kept in an envelope approximately $ 800 she had received from the sale of an automobile.

The defendant says that this testimony was propounded as evidence of habit but that it did not show habit and was not admissible under N.C.G.S. **[***14]** § 8C-1, Rule 406. The defendant says this testimony was evidence of specific instances in which the parents of Ms. Marlowe received sums of money.

[*515] Assuming this testimony was not admissible to prove habit and that it was not admissible under some other rule of evidence, its admission did not amount to plain error. It was not a "'*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done.'" Odom, 307 N.C. at 660, 300 S.E.2d at 378 (quoting United States v. McCaskill, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, *459 U.S. 1018, 74 L. Ed. 2d 513, 103 S. Ct. 381 (1982)* (footnotes omitted)).

This assignment of error is overruled.

The defendant next assigns error to the imposition of the death penalty because he says he is mentally retarded. The *Eighth Amendment to the Constitution of the United States*, which forbids the infliction of cruel and unusual punishment, does not forbid the death penalty for mentally retarded persons. *Penry v. Lynaugh, 492 U.S. 302, 106 L. Ed. 2d 256, 109 S. Ct. 2934 (1989)*. The statute which provides for the death penalty does not have an exception for mental retardation. *N.C.G.S. § 15A-2000* (Supp. 1995). If **[***15]** we are to hold that a mentally retarded person may not be executed in this state, we would have to hold that this part of our capital punishment scheme is unconstitutional under *Article I, Section 27 of the Constitution of North Carolina.*

The first difficulty with the defendant's argument is that it is not at all certain that he is mentally retarded. *N.C.G.S. § 122C-3(22)* defines mental retardation as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before age 22." *N.C.G.S. § 122C-3(22)* (1993). An IQ of less than seventy is considered a "significantly subaverage general intellectual functioning." *State v. Skipper, 337 N.C. 1, 65, 446 S.E.2d 252, 288 (1994)* (Exum, C.J., concurring), **[**54]** *cert. denied*, ___ U.S. ___, *130 L. Ed. 2d 895 (1995)*. The defendant has an IQ of seventy. The defendant presented evidence that he was employed and was able to function in society. This tends to negate a finding that he had a deficit adaptive behavior. The defendant has not shown he is mentally retarded.

The constitutional issue which the defendant presses under this assignment of error is not before us. This **[***16]** assignment of error is overruled.

In his next assignment of error, the defendant argues there were nine different examples of prosecutorial misconduct which entitle **[*516]** the defendant to a new trial. The first instance argued by the defendant involved a question on cross-examination of the defendant in which the prosecutor asked him whether he had been convicted of assault with a deadly weapon inflicting serious injury in 1973. The court sustained the objection to this question and instructed the jury not to consider it.

The State had not advised the defendant of its intent to use the evidence which the question was designed to elicit. The defendant contends it was error for the State to ask this question pursuant to N.C.G.S. § 8C-1, Rule 609(b) because the assault conviction was more than ten years old. Any error that occurred was cured by the instruction to the jury not to consider the question. The information imparted by this question was not so shocking or disturbing that the jury would have been unable to follow the court's instruction. We assume the jury followed the court's instructions. *State v. Larrimore, 340 N.C. 119, 168, 456 S.E.2d 789, 815 (1995)*.

The defendant's second **[***17]** contention is that the prosecutor was guilty of misconduct by asking the defendant's DNA expert whether she knew that she was the second DNA expert consulted by the defendant. The defendant argues that this question was asked in bad faith and was designed to give the jury the impression that the defendant had shopped for an expert until he found one that would testify as the defendant wanted. The defendant contends the prosecutor knew this was not the case. *State v. Dawson, 302 N.C. 581, 276 S.E.2d 348 (1981)*.

The defendant objected to the question. The trial court sustained the objection and instructed the jury to disregard the question and not to consider the question in its deliberations. Assuming without deciding that misconduct occurred, the court's instruction cured any error. The instruction was clear, and we must assume the jury followed the instructions of the court in making its determination. *Larrimore, 340 N.C. at 168, 456 S.E.2d at 815*.

The defendant's fourth contention is that the prosecutor improperly attacked the credibility of the defendant's DNA expert by arguing to the jury that the defendant chose an expert from Ohio rather than choosing one from either **[***18]** of two laboratories in North Carolina.

The defendant objected to the argument. The trial court sustained the objection and instructed the jury not to consider the prosecutor's argument. Again, assuming without deciding that misconduct **[*517]** occurred, the court's instruction cured any error. The instruction was clear, and we must assume the jury followed the instructions of the court in making its determination. *Id*.

The defendant next contends that the prosecutor improperly argued during the argument at the guilt phase that after Mr. Baldwin received his fatal injuries, he was aware or was contemplating that his wife was being raped.

The defendant argues that the prosecutor's argument was improper because the State failed to present any evidence that Mr. Baldwin had the ability to comprehend anything after his carotid artery had been severed. "Counsel is given wide latitude to argue the facts and all

reasonable inferences which may be drawn therefrom, together with the relevant law, in presenting the case to the jury." State v. Britt, 291 N.C. 528, 537, 231 S.E.2d 644, 651 (1977). In addition, during a closing argument, an attorney may, "on the basis of his analysis of the **[***19]** evidence, argue any position or conclusion with respect to a matter in issue." N.C.G.S. § 15A-1230(a) **[**55]** (1988). The forensic pathologist who performed the autopsy on Mr. Baldwin testified at trial that he was unable to determine the exact time of Mr. Baldwin's death. Blood spatters on the wall, bookcases, and the door to Mrs. Baldwin's bedroom supported the inference that Mr. Baldwin received his lethal wound in that location. It could be concluded from the evidence that Mr. Baldwin had the ability to comprehend during the struggle and while he was wounded that his wife might be raped.

The defendant next contends that the prosecutor, during his jury argument, said that defense counsel lied to the jury, which violates the rule of State v. Sanderson, 336 N.C. 1, 442 S.E.2d 33 (1994), that a prosecutor may not engage in improper conduct toward defense counsel. During his jury argument, the prosecutor said, "And [the defendant is] not entitled to have you buy that cock-and-bull mess that [defense counsel] have thrown up to you."

Our review of the record shows that the prosecutor used the term "cock-and-bull mess" to refer to the contention made by defense counsel in closing argument **[***20]** that the investigators should have examined the bag of the vacuum cleaner that was in the hallway near Mr. Baldwin's body for evidence. The record reveals that the prosecutor was merely responding to the contention by saying that it was not logical for the investigators to conclude that the perpetrator used the vacuum cleaner to clean up the blood left from the killings. The prosecutor's argument was directed at the improbability of the story, not **[*518]** at the veracity of defense counsel. The defendant's contention is without merit.

The defendant next contends there was error in the cross-examination of Susan Brooks, a law-student intern with the North Carolina Resource Center, who testified for the defendant. The defendant contends that rather than directing the cross-examination to the substance of Ms. Brooks' testimony, the State concentrated on the nature and function of the Resource Center, which was irrelevant. Ms. Brooks and the Resource Center had helped the defendant prepare his defense. The State was entitled to cross-examine Ms. Brooks about the Resource Center to show bias, motive, or interest. State v. Spicer, 285 N.C. 274, 204 S.E.2d 641 (1974).

The defendant's final **[***21]** contention in this assignment of error is that the State committed gross misconduct during closing argument of the sentencing phase by calling the defendant a liar and by chastising him for exercising his constitutional right to stop talking to police officers.

The defendant argues that the prosecutor called the defendant a liar when he argued to the jury:

> I suppose he would answer questions from the officers, as long as he wasn't telling the truth about it and as long as he was saying, "I didn't do anything."

The prosecutor made this argument while arguing that the jury should not find the nonstatutory mitigating circumstance "that although the defendant did not confess, he was cooperative in answering questions of the investigating officers." The defendant testified at trial that when questioned about going back to the Baldwins' house after he finished his work there, he told the officers that he did not return.

A prosecutor may not express a personal opinion concerning the veracity of a witness' testimony. State v. Miller, 271 N.C. 646, 157 S.E.2d 335 (1967). In this case, the prosecutor was not expressing his belief that the defendant was lying to the police **[***22]** officer. The phrase "I suppose" does not refer to the prosecutor's personal opinion. Rather, it is a comment by the prosecutor on the strength of the evidence supporting the mitigating circumstance.

The defendant also argues that the following argument of the prosecutor was an improper comment on his invocation of the right to remain silent:

> **[*519]** So when [the defendant and the officer] start talking about something real important . . . what does he tell [the officer]? . . . Take me back to my cell.

A defendant's silence after receiving *Miranda* warnings cannot be used against him as evidence of guilt. Doyle v. Ohio, 426 U.S. 610, ***[**56]*** 49 L. Ed. 2d 91, 96 S. Ct. 2240 (1976). Although the record in this case does not indicate whether the defendant received *Miranda* warnings, if he did, the State has not violated his right to silence because the prosecutor's comment did not address the defendant's guilt. Again, the prosecutor's comment was directed at the strength of the evidence supporting the nonstatutory mitigating circumstance that

the defendant was cooperative in answering the questions of the investigating officers. The prosecuting attorney was merely arguing to the jury **[***23]** that it should not find any mitigating value in the mitigating circumstance. *See State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994), cert. denied*, ___ U.S. ___, *133 L. Ed. 2d 60 (1995)*.

This assignment of error is overruled.

In his next assignment of error, the defendant argues that the trial court violated his due process rights by failing to inform the jury that he was unlikely ever to be paroled. We addressed this issue and found against the defendant's position in *State v. Jones, 336 N.C. 229, 443 S.E.2d 48*, *cert. denied*, ___ U.S. ___, *130 L. Ed. 2d 423 (1994)*, and *State v. Skipper, 337 N.C. 1, 446 S.E.2d 252*. The defendant presents no new arguments that persuade us to reconsider these holdings.

In his next assignment of error, the defendant argues that the court erred by failing to require the jury to consider any mitigating circumstance found in Issue Two when weighing the aggravating circumstances against the mitigating circumstances in Issues Three and Four. The court gave an almost identical charge on this point in *State v. Lee, 335 N.C. 244, 439 S.E.2d 547*, *cert. denied*, ___ U.S. ___, *130 L. Ed. 2d 162 (1994)*. We found no error in that case, **[***24]** and the defendant has presented no new argument that persuades us to change our position. This assignment of error is overruled.

The defendant next contends it was error for the court to charge the jury that in order to find a nonstatutory mitigating circumstance, it must find the facts supporting the circumstance to exist and that those facts have mitigating value. We held this was a proper charge in *State v. Hill, 331 N.C. 387, 417 S.E.2d 765 (1992)*, *cert. denied*, ___ U.S. ___, *122 L. Ed. 2d 684 (1993)*. The defendant presents no new **[*520]** argument which persuades us to change our position. This assignment of error is overruled.

The defendant assigns error to a statement by the court to the jury. After the jury had been excused for the evening meal and seven of the jurors had left the courtroom, the foreman of the jury sent a message to the judge through the bailiff "that one juror wanted to talk to the judge, that the juror could not decide." The judge responded:

> Now, the Court cannot talk to any juror alone. The Court can only make comments in the presence of all twelve jurors. So I ask that all twelve jurors now leave and come back at seven-thirty.

The jurors **[***25]** returned from their recess at 7:30 p.m., and the court instructed them as follows:

> Now, members of the jury, before I ask you to go back into the jury room to continue your deliberations, I would like to inform you of a rule of the Court. The Judge cannot answer a question without all twelve jurors present. If you have any question you wish to have answered, in the jury room agree upon what the question is, have the foreperson write the question down on a piece of paper, and then all -- knock on the jury room door and all twelve of you come back into the courtroom. And then at that time the foreperson of the jury can present the written question to the Judge for an answer.

The jury then retired to the jury room. It did not submit a question to the court. The defendant says that the court, by its statement to the jury, imposed a rule that required the assent of all jurors for a single juror to communicate with the court. We disagree.

We read the court's statement to mean that if one or more of the jurors wanted to ask a question of the court, the jury would agree on the form of the question, and the foreman could submit the question in writing **[**57]** to the court. There was **[***26]** no restriction on any question a juror desired to ask.

This assignment of error is overruled.

In his final assignment of error, the defendant contends that the trial court erred by failing to conduct an individual jury poll as required by *N.C.G.S. § 15A-2000(b)*. The defendant argues that the record shows that the foreperson answered the question, "Do you still assent thereto?" for jurors one, two, four, five, six, seven, and eight. The defendant is correct in his assertion that the original transcript **[*521]** indicated that the foreperson answered the question for those jurors. The transcript has been amended by the court reporter, however, to correct the typographical error of substituting "foreperson" for the juror who was actually answering the question. The amended transcript shows that each juror answered each question in compliance with *N.C.G.S. § 15A-2000(b)*.

This assignment of error is overruled.

We find no error in the trial or sentencing hearing.

PROPORTIONALITY REVIEW

Finding no error in the trial, it is our duty to determine (1) whether the record supports the jury's finding of aggravating and mitigating circumstances; (2) whether any of the sentences were imposed under **[***27]** the influence of passion, prejudice, or any other arbitrary factor; and (3) whether either of the sentences of death is excessive or disproportionate to the penalty imposed in similar cases. N.C.G.S. § 15A-2000(d)(2); State v. Robbins, 319 N.C. 465, 356 S.E.2d 279, *cert. denied*, *484 U.S. 918, 98 L. Ed. 2d 226, 108 S. Ct. 269 (1987)*. An examination of the record reveals the evidence supports the findings of the aggravating and mitigating circumstances. The defendant does not contend otherwise. We also hold that the sentences were not imposed under the influence of passion, prejudice, or any other arbitrary factor.

Our next task is to determine whether either of the sentences imposed is excessive or disproportionate to the penalties imposed in similar cases. For both crimes, the jury found three aggravating circumstances: (1) the defendant had previously been convicted of a felony involving the use or threat of violence to the person, (2) the murder was committed for pecuniary gain, and (3) the murder was part of a course of conduct in which the defendant engaged that included the commission by the defendant of a crime of violence against another person. N.C.G.S. §§ 15A-2000(e)(3), (6), (11).

[*28]** Twenty-eight mitigating circumstances were submitted to the jury. One or more jurors found eleven of them, none of which were statutory mitigating circumstances.

This Court gives great deference to a jury's recommendation of a death sentence. State v. Quesinberry, 325 N.C. 125, 145, 381 S.E.2d 681, 694 (1989), *sentence vacated on other grounds*, *494 U.S. 1022, 108 L. Ed. 2d 603 (1990)*. In only seven cases have we found a death **[*522]** sentence disproportionate. *See* State v. McCollum, 334 N.C. 208, 240-42, 433 S.E.2d 144, 162-63 (1993), cert. denied, ___ U.S. ___, 129 L. Ed. 2d 895 (1994). In several cases which have characteristics similar to this case, we have affirmed the imposition of the death penalty.

We note first that this Court has never found a death sentence disproportionate when a defendant was convicted of more than one murder. State v. Garner, 340 N.C. 573, 610, 459 S.E.2d 718, 738 (1995). In fact, the defendant's status as a multiple killer is a "heavy factor to be weighed against the defendant." State v. Laws, 325 N.C. 81, 123, 381 S.E.2d 609, 634 (1989), *sentence vacated on other grounds, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990)*.

We found the death **[***29]** sentence not disproportionate in State v. Gardner, 311 N.C. 489, 319 S.E.2d 591, in which the jury found two of the same aggravating circumstances found in this case, that the murder was committed for pecuniary gain and that the murder was part of a course of conduct which included the commission of crimes of violence against another person. We also found the death sentence not disproportionate in State v. Green, 336 N.C. 142, 443 S.E.2d 14, *cert. denied*, ___ U.S. ___, *130 L. Ed. 2d 547 (1994)*, and State v. Miller, 339 N.C. 663, ***[**58]*** 455 S.E.2d 137, *cert. denied*, ___ U.S. ___, *133 L. Ed. 2d 169 (1995)*. In both of those cases, the jury found the same three aggravating circumstances found in this case.

We are impressed with the brutality and the wanton disregard for human life present in this case. The defendant beat and stabbed the victims to facilitate a robbery. When the killings in this case are compared to those in the cases listed above in which death sentences were imposed, the similarity of the characteristics of the cases convinces us that the penalties imposed in this case are not excessive or disproportionate to the penalties imposed in similar cases, considering **[***30]** the crimes and the defendant.

We hold that the defendant received a trial and sentencing hearing free of prejudicial error; that the aggravating circumstances found were supported by the evidence; that the sentences of death were not imposed under the influence of passion, prejudice, or any other arbitrary factor; and that the sentences of death are not excessive or disproportionate to the penalties imposed in similar cases.

NO ERROR.

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STATE OF NORTH CAROLINA — IN THE GENERAL COURT OF JUSTICE

COUNTY OF BLADEN — SUPERIOR COURT DIVISION

FILE NO. 91 CrS 2621-22

STATE OF NORTH CAROLINA)
) TRANSCRIPT, Volume I of I
v.) (Pages 1 - 91)
)
NORFOLK JUNIOR BEST,) Monday, April 11, 2016
)
Defendant.)

Columbus County Criminal Superior Court

April 11, 2016 Special Session

The Honorable Douglas B. Sasser, Judge Presiding

DNA Motion Hearing

APPEARANCES:

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Exhibit 4, what does that comparison tell you?

A. The DNA profile obtained from the sperm fraction of the vaginal swabs once again matches the DNA profile obtained from the buccal swabs from the defendant.

MR. BABB: May I approach, Your Honor?

THE COURT: You may.

Q. Mr. Boodee, I've just handed you what has been marked as State's Exhibit 5. Do you recognize it?

A. This is a tabulation of the calculation which was done based on the STR analysis of the comparison of the sperm fraction back to -- or the major profile of the sperm fraction back to the standard from the defendant.

Q. And before I ask you anything else about that exhibit, would you explain -- you've done it a little before earlier in your testimony, but would you explain Random Match Probability.

A. Sure. Once again, the main use, the most important use of forensic DNA analysis is to exclude someone from the possibility of being involved with a crime. Once we can't do that, we then have to go into the population and say: How frequently is this DNA profile found within the population? What is the possibility of a random match?

The way that you do that is what's known as doing a Random Match Probability calculation. And in this particular case, Sorenson Forensics has done this basically

in the same method that we would do at the State Crime Laboratory, the same way the FBI does it, the same way hopefully every accredited laboratory throughout the United States would do it the same way, to come up with a frequency of how frequently this profile could be found or estimated to be in the population.

Q. And what is the result of the Random Match Probability of this profile occurring, again, in the African American population?

A. It's 1 in 490 trillion.

Q. Mr. Boodee, could you explain why Random Match Probability is not used with Y-STR DNA testing?

A. With the Y chromosome, as Dr. Noureddine was saying earlier, they are all found on the Y chromosome themselves. So what you are looking for when you are doing STR analysis is for all of the different chromosomes to be independent of each other. If they are all independent or found in different chromosomes, they are all not linked to each other, you can then use what's known as the Product Rule in order to multiply the frequency by each other.

Now, on the Y chromosome, it hasn't been shown yet, it hasn't been proven, that all of these different loci are independent, or they are not linked to each other. So you can't use the same calculation method for STRs with Y-STR analysis. You have to use a different method, which